

# Client Alert

May 2020

## Update On PPP Loans - Major Change to Employee Counting Rules and Due Date Extension

In new guidance issued on May 6, 2020, the Small Business Administration (“*SBA*”) issued major new guidance on the Paycheck Protection Program (“*PPP*”):

1. ***New Retroactive Counting Rules for 500 Employee Limit.*** In [new FAQ-44](#), the SBA declares that all employees (domestic and foreign-based) of a PPP loan applicant (and its affiliates) now count towards the 500 employee limit for PPP eligibility, in an apparent reversal of prior guidance in FAQ-3 (U.S. employees only). Under now-overruled FAQ-3, only employees with a principal place of residence in the United States counted towards the 500-employee limit. In addition, the SBA also released a [new interim final rule](#), requiring interns and other student workers (with certain exceptions) to be taken into account for purposes of the 500-employee limit.
2. ***Uncertain Status of PPP Loans under New Counting Rules.*** Without any retroactive relief, the new counting rules implicitly invalidate all pre-existing PPP loan applications and PPP loans, where the applicant or borrower retroactively exceeds the 500 employee limit under the new counting rules. As a result, new FAQ-44 seems to imply that a retroactively-disqualified borrower cannot use and must immediately repay any PPP loan proceeds. Coming so late in the game, these new counting rules may create substantial hardship for many PPP borrowers and applicants, particularly those borrowers that have already expended PPP loan proceeds.
3. ***Extended Due Date for PPP Loan Repayment (May 14).*** In new FAQ-43, the SBA extends the due date for the repayment of a PPP loan without penalty from May 7 to May 14, if a borrower no longer believes that it can certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant” (the “*Necessary*”

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*Certification*”). We suspect that this extension was also prompted in part by the new employee counting rules.

4. ***Promises of Additional Guidance on the Necessary Certification.***

In extending the curative repayment date to May 14, the SBA announced its intention to provide prior to May 14 additional guidance on the Necessary Certification. We expect that this additional guidance will further restrict access to the PPP loan program for applicants and borrowers with access to capital.

Given the magnitude of the potential consequences of the counting rules, we are closely monitoring the situation for further guidance from the SBA.

Olshan lawyers from multiple practice groups are working together with clients to address COVID-19-related matters, including the CARES Act stimulus programs (i.e., the PPP and EIDL) and other corporate matters, including contractual analysis and financing, tax, restructuring, employee benefits and employment practices, insurance coverage, and litigation. Click [here](#) to access additional materials addressing issues raised by COVID-19.

Please contact the Olshan attorney with whom you regularly work or one of the attorneys listed below if you would like to discuss this client alert or have questions about its content.

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